

No. 13,669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners,
Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S.A., a Corporation,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S PETITION FOR REHEARING.

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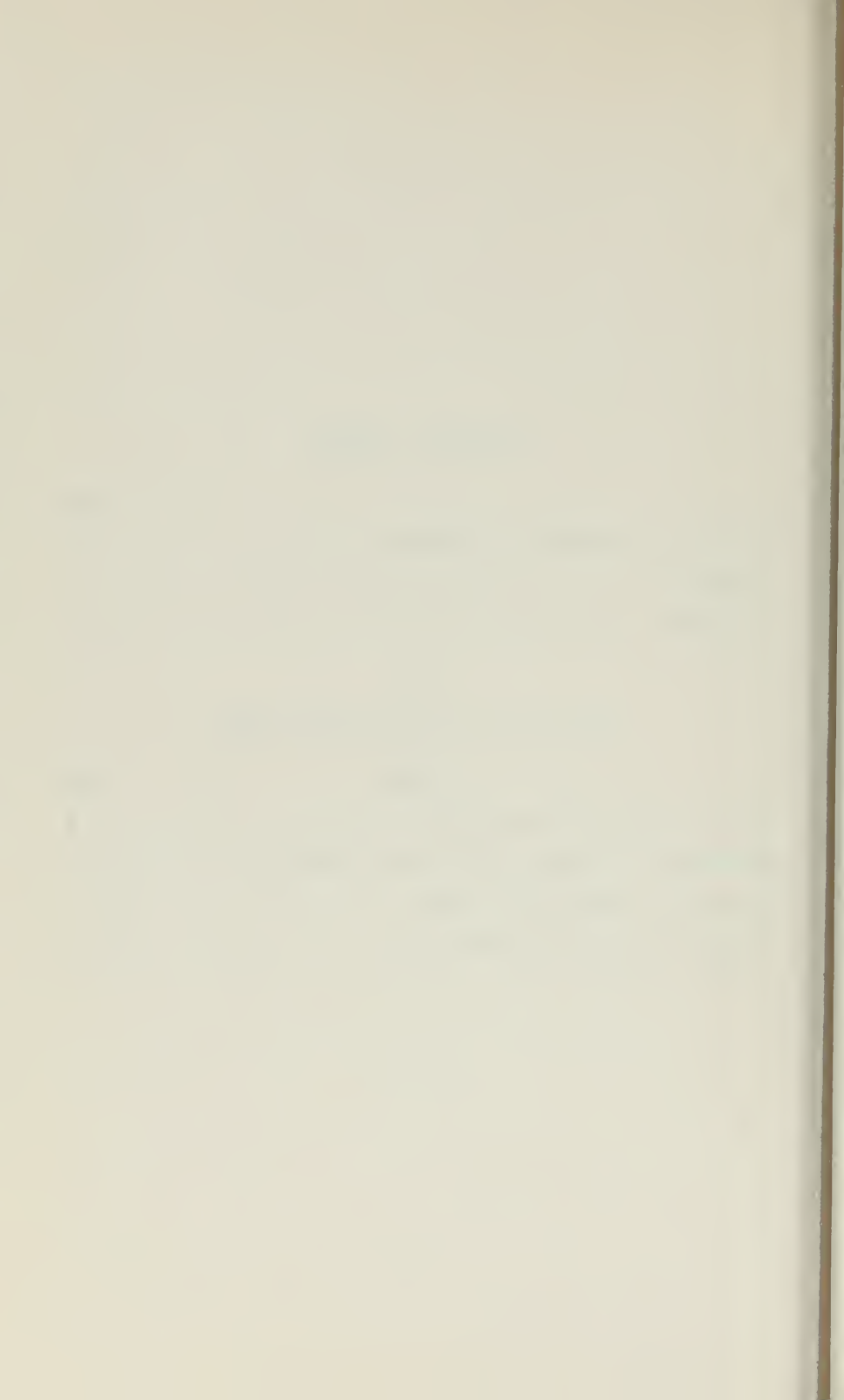
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APPELLEE'S PETITION FOR REHEARING.

Constructora, S.A., a corporation, Appellee, hereby respectfully petitions this Court for rehearing in this cause and for the withdrawal of this Court's opinion and decision dated June 28, 1954.

Statement of Grounds for Rehearing.

That the opinion of this Honorable Court, reversing the judgment of the United States District Court was in error in the following:

1. This Court erred in ignoring the leading California case of *McPheeters v. Bateman*, 11 Cal. App. 2d 106,

which is the applicable law to the facts of the case at issue cited in Appellee's Appeal Brief.

2. This Court erred in relying upon the cases of *Robinson v. Kellum*, 6 Cal. 399, and *Vesper v. Crane Co.*, 165 Cal. 36, since the facts and the law of these cases are not applicable to the case at issue.

3. This Court erred in holding that Appellee could not recover damages in the United States District Court because Appellee did not prove malice, ill will or lack of probable cause on the part of Appellants.

Argument.

1. The Court misconstrued the facts at issue. Constructora, S.A., was an innocent third party whose motor grader was attached by Appellants when Appellants were seeking property belonging to VillaSenor, the Defendant, who was being sued by Appellants in the Superior Court action. Appellee was a stranger to the litigation between Appellants and the mentioned VillaSenor. Therefore, when Appellants attached Appellee's property the Appellants committed an act of trespass to Appellee's personal property. The leading case of *McPheeters v. Bateman*, 11 Cal. App. 2d 106, is applicable.

Judge Shinn in the case of *McPheeters v. Bateman*, *supra*, at page 107, states:

"This is an appeal by defendant Alynette Bateman from a judgment for damages caused by the levy of an execution upon the property of plaintiff herein, who was not the judgment *debtor*. . . ." (Emphasis ours.)

At page 109 Judge Shinn points out that:

“Where an execution is levied upon property which does not belong to the judgment debtor, the owner of the property is entitled to recover from those responsible for the levy of such damage as he may have suffered by reason of the levy, and any further proceedings taken thereunder. *He sues for trespass to the property and not for malicious prosecution*, unless he also seeks to charge the wrongful doer with exemplary damages.” (Emphasis ours.)

At page 109 Judge Shinn after discussing the damages awarded states:

“These damages were reasonable *even though the levy was made upon sufficient cause and without malice*, and this part of the judgment should be affirmed.” (Emphasis ours.)

This theory of law was thoroughly discussed by the Trial Judge of the United States District Court as shown in the Reporter’s Transcript of Proceedings which is before this Court, commencing at page 19 and ending at page 24. There the Court also cited the case of *Breard v. Lee*, 192 Fed. Rep. 72. In that case in applying California law the Court stated at page 73:

“Wherein, under well established principles, these facts are lacking in the essentials of a cause of action for a tortious taking and conversion of property, is not readily to be perceived. Certainly no question is better settled by the course of decision generally under our system than that one who takes the property of another without right, whether under color or official authority or otherwise, is guilty of a wrongful and tortious act, and that an action in the nature of either trespass, trover, or replevin will lie for its correction. This is true as well where

which is the applicable law to the facts of the case at issue cited in Appellee's Appeal Brief.

2. This Court erred in relying upon the cases of *Robinson v. Kellum*, 6 Cal. 399, and *Vesper v. Crane Co.*, 165 Cal. 36, since the facts and the law of these cases are not applicable to the case at issue.

3. This Court erred in holding that Appellee could not recover damages in the United States District Court because Appellee did not prove malice, ill will or lack of probable cause on the part of Appellants.

Argument.

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the property is taken under a supposed claim of right as where the taking is with knowledge of the wrong, since in either case the trespasser acts at his peril. And one who directs the taking by an officer executing a writ of property not rightfully subject thereto is equally guilty of the wrong committed as the officer who executes the writ. In such an instance both the officer and the one who directs the taking are joint tort feasons, and either one or both may be held responsible by the owner at his election. These principles are so fully established as to require no elaborate citation of authorities in their support."

In view of the above it is readily apparent that the case before the Court is an action for damages for trespass and not for wrongful attachment or malicious prosecution. Therefore the elements of malice, ill will or lack of probable cause do not apply.

2. The Court erred in relying on the law of the case of *Robinson v. Kellum*, 6 Cal. 399, and *Vesper v. Crane Co.*, 165 Cal. 36, Appellee has no quarrel with the principles of law promulgated in those cases. Those cases pertain to a suit by a successful defendant against an attaching plaintiff in which case the issues of malice or lack of probable cause are very definitely to be considered. However, Appellee's case involves trespass to an innocent stranger to the litigation between the attaching party and the defendant VillaSenor.

It is an accepted rule that the Courts place a heavy burden on a party to a litigation to prove a clear abuse of civil processes, before affording the injured party a

claim for damages. The Courts demand clear proof of malice or lack of probable cause to satisfy that burden.

The above burden of proof of malice or lack of probable cause is not placed upon an innocent party who has his property attached by a plaintiff in the mistaken belief that it is the property of the defendant. The mere unwarranted exercise of dominion over the innocent party's property is a *trespass*. The law pertaining to the recovery of damages for trespass is too well established for appellee to cite cases in its support.

3. This Court in its opinion quoted a conclusion of law of the District Court which stated:

“. . . and that the fact the defendants did not act with malice or ill will, or without probable cause, does not excuse the said defendants from the damages caused plaintiff by said defendants.”

Since this case is clearly one of trespass the conclusion of law cited above is correct; for it is immaterial whether the Appellant did or did not act with malice or ill will or lack of probable cause, for a recovery of damages for trespass does not contemplate these issues at all.

It was clearly established in the early stages of this litigation by stipulation of the parties and by order of Court as shown by the “Stipulation of Facts and Issues and Pre-trial Order [Tr. of Rec. pp. 16-23], that the issues of malice and lack of probable cause were not to be considered any further; since they were excluded from

the statement of issues to be tried [Tr. of Rec. pp. 21, 22 and 23].

The parties to this litigation and the Trial Court framed the trial issues of this case to either prove or disprove trespass, and in the event trespass was proved, whether any damage to Appellee resulted therefrom. No issues of wrongful attachment with malice or lack of probable cause supporting it, were ever considered or mentioned at the actual trial of this action.

Conclusion.

We respectfully urge this Court to grant this Petition for Rehearing and to affirm the judgment granted by the District Court in favor of Appellee.

NEWMAN & NEWMAN,

JOSEPH GALEA,

By ANTHONY M. NEWMAN,
Attorneys for Appellee.

Certificate of Counsel.

We, Counsel for Appellee of the above entitled cause do hereby certify that the foregoing Petition for Ruling is, in our opinion, well founded and is not interposed for delay.

NEWMAN & NEWMAN,

JOSEPH GALEA,

By ANTHONY M. NEWMAN,
Attorneys for Appellee.